

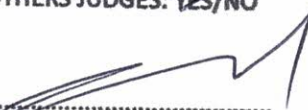
**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**



Case number: 68566/2018

Date of hearing: 13 December 2018

Date delivered: 30 January 2018

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO	
(2) OF INTEREST TO OTHERS JUDGES: YES /NO	
(3) REVISED	
30/1/19	
DATE	SIGNATURE

In the application of:

THE STANDARD BANK OF SOUTH AFRICA LTD

Plaintiff

and

ANTHONY ANDREW WILKENS

Defendant

JUDGMENT

SWANEPOEL AJ:

[1] This is an application for summary judgment. Plaintiff issued summons against Defendant for payment of the sum of R 500 371.23. It is common cause that plaintiff granted an overdraft facility to a business known as Trafalgar Plumbing and Drain Services CC ("Trafalgar"). It is also common cause that on 7 February 2003 Defendant bound himself as surety and co-principal debtor with Trafalgar for repayment of the latter's debt.

[2] Trafalgar was wound up on 26 September 2016. A substantial sum of money was still owed to plaintiff, which, calculated at 25 June 2018, amounted to the claimed amount.

[3] Defendant entered an appearance to defend, whereafter plaintiff applied for summary judgment. Rule 32 (3) of the Uniform Rules of Court requires a defendant against whom summary judgment is being sought to either give security for any judgment and costs (rule 32 (3) (a)), or to deliver an affidavit opposing the application deposed to by defendant or any person who can swear positively to the fact that defendant has a *bona fide* defence to the action. Defendant is required to fully set out the nature and grounds of the defence in the affidavit, and the facts relied upon (rule 32 (3) (b)).

[3] In his affidavit opposing summary judgment Defendant raises three defences:

3.1 That the suretyship creates an accessory debt, which is dependent upon the principal debt. Plaintiff had not attached

a copy of the main agreement between plaintiff and Trafalgar to its particulars of claim, which Defendant avers is fatal to its claim;

3.2 That the suretyship was intended to apply to a first overdraft facility that was granted in 2003. That facility was called up by plaintiff and settled by defendant settled, whereafter defendant did not owe any further monies to plaintiff. The current debt allegedly arises from a further overdraft that arose after the commencement of the National Credit Act, 2005 ("the Act"). It is defendant's case that the settling of the original debt resulted in the debt being extinguished and the suretyship terminating.

3.3 That the granting of further credit after commencement of the Act constituted reckless credit, by virtue of the fact that plaintiff did not conduct a credit assessment to ascertain whether the granting of a further loan was not reckless credit.

[4] It would be opportune firstly to deal with the defence that the particulars of claim did not disclose a cause of action because the main agreement between the plaintiff and Trafalgar had not been annexed. That contention was already dealt with by my sister Khumalo J in the unreported case of **Standard Bank of South Africa Ltd v Redmond** (case number 2015/80438), where she found that the cause of action in a claim based upon a suretyship was the suretyship itself. The absence

of the main agreement did not render the particulars of claim excipiable.
I am respectfully in agreement with Khumalo J.

[5] A further defence is that the overdraft was recklessly granted by the plaintiff. As plaintiff points out in its heads of argument, the principal debtor is a juristic person, and the provisions of the Act relating to reckless credit are not applicable to a juristic person (section 6 (a) of the Act).

[6] The final defence is that the original debt arose from an agreement between Trafalgar and plaintiff in 2003 in terms of which Trafalgar was granted an overdraft facility. That facility was called up, and the debt was settled. It is defendant's case that the payment of the overdraft facility extinguished the debt, which resulted in the suretyship terminating.

[7] Clause 1 of the suretyship reads as follows:

"I/We, Anthony Andrew Wilkenson (Identity number.....) bind myself/ourselves as surety(ies) and co-principal debtor(s) for the payment when due of all the present and future debt of any kind ("the Debts") of Trafalgar Plumbing and Drain Services Close Corporation (Registration number 1997/041379/23) ("the Debtor") to The Standard Bank of South Africa Limited (Registration number 1962/000738/06) ("the Bank"), or to anyone who takes transfer of the Bank's rights under this suretyship."

[8] Clause 8.3 of the suretyship provides that renewal, change or withdrawal of any facilities granted to the debtor did not affect the liability of defendant under the suretyship. Clause 12.1 provides that the suretyship would not end if there is temporarily no debt. Clause 12.6 reads as follows:

"12.6 My/Our liability for the Debts will only end when-

12.6.1 my/our liability has been extinguished; or

*12.6.2 the Bank gives me/us a written release from liability
under this suretyship; or*

12.6.3 the Bank cancels this suretyship in writing;

[9] Clause 12.7 provides that the suretyship may only be terminated, cancelled or other wise brought to an end in the way provided for in the suretyship.

[10] Clause 12.1 reads as follows:

*"This suretyship does not end if temporarily there are no debts
or because of the death or legal disability of the Debtor or
me/us."*


[11] In the event that a debtor temporarily pays up his debts, without cancelling the overdraft facility, no doubt clause 12.1 would take effect, and any debt incurred thereafter would still be subject to the suretyship.

In casu however, the overdraft facility was called up by plaintiff. The debt was paid, and only some time later was a further overdraft facility agreed upon.

[12] In my view defendant may possibly make out a case on trial that the debt was extinguished as provided for in clause 12.6.1, and that the suretyship had terminated. Consequently I find that defendant has disclosed sufficient facts that, if proven at trial, would result in defendant being successful.

[13] I consequently make the following order:

- 13.1 Defendant is granted leave to defend.
- 13.2 The costs of the application will be costs in the cause.



Swanepoel AJ
Acting Judge of the High Court,
Gauteng Division, Pretoria